Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NORTHBROOK PROPERTY AND
CASUALTY INSURANCE COMPANY

Petitioner,

vs.

BENNIE EDWARDS and JOANN EDWARDS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, OR, IN THE ALTERNATIVE, BRIEF OF AMICUS CURIAE NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT B. MILLNER
(Counsel of Record)
LORIE A. CHAITEN
Sonnenschein Nath & Rosenthal
8000 Sears Tower
Chicago, Illinois 60606-6404
(312) 876-8000

Counsel for Petitioner
Northbrook Property and Casualty
Insurance Company

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QUESTIONS PRESENTED

In April 1989, Bennie and Joann Edwards obtained an asbestos-injury judgment against The Celotex Corporation in the Northern District of Texas, which judgment was affirmed by the Fifth Circuit and was secured pending appeal by a supersedeas bond. Thereafter the bankruptcy court in the Middle District of Florida — which presides over the Celotex Chapter 11 reorganization case — entered an injunction, under Section 105 of the Bankruptcy Code, prohibiting all persons from, *inter alia*, executing on supersedeas bonds that Celotex had posted. Notwithstanding the bankruptcy court's injunction (and without seeking relief or appeal therefrom within the Eleventh Circuit), the Edwards obtained an order from the Texas district court, under Fed. R. Civ. P. 65.1, permitting execution against the surety on the bond, and the Fifth Circuit affirmed. The questions presented are:

A. Whether the Fifth Circuit's decision to permit execution on the bond is in conflict with applicable precedent of this Court holding that "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order," *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 386 (1980) (citations omitted); and

B. Whether the Fifth Circuit's collateral attack on, and interference with, the injunction of a bankruptcy court in another circuit violates established principles of comity and federal jurisdiction and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

LIST OF PARTIES

The parties to the proceedings below are identified in the caption of the case. Although not formally named as a party in the proceedings below, Northbrook Property and Casualty Insurance Company[1] has an interest in the outcome of this litigation because Northbrook is the surety on the supersedeas bond at issue here and is the surety on other bonds Celotex posted. As a result, Northbrook is petitioning for leave to intervene to file a petition for a writ of certiorari or, in the alternative, is filing this Brief as *amicus curiae* in support of Celotex's petition for a writ of certiorari.[2]

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[1] Northbrook is a wholly-owned subsidiary of Allstate Insurance Company, which is a wholly-owned subsidiary of The Allstate Corporation, which is wholly owned by Allstate Holdings, Inc., 80% of which is owned by Sears, Roebuck and Co.

[2] Northbrook participated in the proceedings in the United States District Court for the Northern District of Texas by filing Northbrook Property and Casualty Insurance Company Memorandum In Opposition To Motion For Release Of Supersedeas Bond and by participating in the filing of a Joint Status Report. (A-25.)

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No. _____

IN THE

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OCTOBER TERM, 1993

THE CELOTEX CORPORATION,

Petitioner,

v.

BENNIE EDWARDS and JOANN EDWARDS,

Respondents.

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, OR, IN THE ALTERNATIVE, BRIEF OF AMICUS CURIAE NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Northbrook Property and Casualty Insurance Company ("Northbrook") prays for leave to intervene and further prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in *Edwards v. Armstrong World Indus., Inc.*, on November 5,

1993, and the denial of Celotex's petition for rehearing and suggestion for rehearing *en banc*, entered on December 22, 1993. In the alternative, Northbrook files this Brief in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, filed by Celotex, in accordance with Rule 37 of the Rules of this Court and pursuant to the attached consent of all parties.

OPINIONS BELOW

The Fifth Circuit's opinion as to execution on the supersedeas bond (A-1) is reported at 6 F.3d 312. The Fifth Circuit's denial of the petition for rehearing and suggestion for rehearing *en banc* (A-19) is reported at 6 F.3d 321. The order of the district court (A-24) is unreported.

JURISDICTION

The judgment of the Fifth Circuit was entered on November 5, 1993, affirming the decision of the United States District Court for the Northern District of Texas. On December 22, 1993, the Fifth Circuit entered its order denying Celotex's petition for rehearing and suggestion for rehearing *en banc*. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Federal Rule of Civil Procedure 65.1, 11 U.S.C. §105(a) and 28 U.S.C. §§ 158(a), 1334(b):

Fed. R. Civ. P. 65.1

Whenever these rules, including the Supplemental Rules for Certain Admiralty and Maritime Claims, require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

11 U.S.C. §105(a).

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

28 U.S.C. §158(a).

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

28 U.S.C. § 1334(b)

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

REASONS FOR GRANTING LEAVE TO INTERVENE, AND, IN THE ALTERNATIVE, INTEREST OF AMICUS CURIAE

Northbrook petitions for leave to intervene because it has a vital interest in not being subjected to conflicting orders, from two federal courts in different circuits, as to execution rights on a surety bond Northbrook has issued. In the event that the Court denies Northbrook leave to intervene to file its petition for a writ of certiorari, Northbrook files this Brief as *amicus curiae* in support of Celotex's petition.

Northbrook and its parent, Allstate Insurance Company (jointly "Northbrook"), are authorized to write supersedeas bonds in all 50 states. They have obtained in excess of $20 million in bonds on behalf of Celotex and its wholly-owned subsidiary, Carey Canada Inc. (jointly "Celotex"), to permit appeals from judgments against Celotex in asbestos cases. At Celotex's request, and pursuant to a settlement agreement resolving an insurance coverage dispute, Northbrook, as surety, posted a bond to supersede the judgment of Joann and Bennie Edwards ("Edwards") against Celotex (the "Edwards Bond").

Thereafter Celotex filed for protection under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida (the "bankruptcy court"), and the bankruptcy court entered an order enjoining execution on the Celotex bonds (the "Section 105 Injunction"). *See generally*

In re Celotex Corp., 128 B.R. 478 (Bankr. M.D. Fla. 1991); *In re Celotex Corp.*, 140 B.R. 912 (Bankr. M.D. Fla. 1992). Both Edwards and Northbrook are defendants in an adversary proceeding in the bankruptcy court, *The Celotex Corp. v. Allstate, et al.*, Adv. Pro. No. 92-584, in which Celotex asserts that 229 bonded claimants, including Edwards, should not be permitted to execute on the bonds, in whole or in part, because the punitive damage portions of certain judgments can be voided and because the bonded claimants — by virtue of the bonds and their collateralization — are beneficiaries of Celotex asset transfers that are avoidable as preferences and fraudulent transfers. *See* 11 U.S.C. §§ 544, 547, 548, 550.

Edwards did not seek relief in the bankruptcy court from the Section 105 Injunction and did not seek review of that order within the Eleventh Circuit. Instead, Edwards went to a court in another circuit to seek an order permitting what the bankruptcy court prohibited.

Notwithstanding the Section 105 Injunction, the Fifth Circuit's decision permits Edwards to execute against Northbrook on the Edwards Bond. If Northbrook pays on the Edwards Bond, however, it risks violation of the bankruptcy court's Section 105 Injunction. Yet, Northbrook cannot — consistent with the Fifth Circuit's decision — resist payment. The ramifications of the disagreement between the bankruptcy court and the Fifth Circuit escalate as others of Celotex's 229 bonded judgment claimants are emboldened by the Fifth Circuit's decision to attempt execution on their bonds. Northbrook already has participated in a number of such proceedings spawned by the Fifth Circuit's decision.

Northbrook is not filing this Brief to support or oppose the merits of the Section 105 Injunction. Northbrook never sought an injunction against execution on the Edwards Bond or any other bond it provided for Celotex. Northbrook has been, and is today, willing to pay on the Edwards Bond provided that

payment is not in contravention of court order. Northbrook has no interest in avoiding payment on the bonds it obtained for Celotex. Under the terms of a settlement agreement with Celotex, such payment would simply reduce *pro tanto* Northbrook's insurance settlement obligation to Celotex. Indeed, pursuant to the May 29, 1992 order of the bankruptcy court, Northbrook has placed sufficient funds (in excess of $20,000,000) in a special account to assure payment on the bonds Northbrook obtained at Celotex's request. 140 B.R. at 917.

Northbrook files this Brief to emphasize the importance of adherence to a rule of law that prevents collateral judicial attack and requires that injunctions be obeyed unless they are overturned through appropriate appellate process. Without intervention from this Court, Northbrook and other Celotex sureties (who collectively issued $70,000,000 in supersedeas bonds for Celotex) remain caught between conflicting decisions of two courts in two different circuits.

STATEMENT OF THE CASE

This is a case of direct interference by a federal court of appeals with the continuing injunctive power of a bankruptcy court in a different circuit.

A. The Underlying Tort Judgment

In April of 1989, the United States District Court for the Northern District of Texas entered a $281,025.80 judgment in favor of Edwards and against Celotex for asbestos-related injuries. The bulk of the jury award, $245,500, was for punitive damages. Diversity jurisdiction was invoked under 28 U.S.C. § 1332.

Celotex appealed the punitive damage award. To stay execution on the judgment pending appeal, Celotex posted a

supersedeas bond for $294,987.88. Northbrook was surety on the bond. The bond was secured with insurance proceeds remaining to be paid to Celotex under a settlement agreement resolving coverage disputes between Northbrook and Celotex.

In an opinion issued on September 20, 1990, the Fifth Circuit affirmed Edwards' judgment against Celotex. *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151 (5th Cir. 1990). On October 12, 1990, the mandate issued. That same day, Celotex filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida.

B. The Bankruptcy Court Section 105 Injunction

Celotex is a manufacturer of building and roofing products. On October 12, 1990, Celotex had over 100 asbestos-related bodily injury cases on appeal. Celotex had stayed judgments totalling nearly $70 million by posting supersedeas bonds, for which it had provided security. *See Celotex*, 140 B.R. at 913-14; *Celotex*, 128 B.R. at 482-83.

On October 17, 1990, on Celotex's motion, the bankruptcy court issued an injunction under Section 105 of the Bankruptcy Code to augment the automatic stay. In pertinent part, the Section 105 Injunction states that "all Entities are hereby jointly and severally stayed, restrained and enjoined from commencing or continuing any judicial, administrative or other proceeding involving any of the Debtors regardless of ... whether the matter is on appeal and a supersedeas bond has been posted ...." (Order ¶ 3, A-35.) As stated by the bankruptcy court, the Section 105 Injunction "was for the purpose of precluding, among other things, judgment creditors from proceeding in various state and federal courts against supersedeas bonds without first coming before this Court." 128 B.R. at 482 (footnote omitted). The order provided that any party in interest could seek relief from its restraints upon 30 days' notice and hearing. (Order ¶ 4, A-35.)

C. Further Bankruptcy Court Proceedings Concerning Its Injunction

On June 13, 1991, the bankruptcy court reaffirmed the Section 105 Injunction and made clear that the injunction prohibits execution on any supersedeas bond even after the appellate process had concluded:

> As to the utilization of Section 105 vis-a-vis the supersedeas bonds, once the judgment creditor has been successful throughout the appellate process, the judgment creditor is not able to proceed against the supersedeas bond without seeking to vacate the Section 105 stay in this Court.
>
> * * *
>
> Accordingly, it is:
>
> ORDERED, ADJUDGED AND DECREED that:
>
> * * *
>
> 3. Where at the time of filing the petition, the appellate process between Debtor and the judgment creditor had been concluded, the judgment creditor is precluded from proceeding against any supersedeas bond posted by Debtor without first seeking to vacate the Section 105 stay entered by this Court.

128 B.R. at 484, 485; *accord Celotex*, 140 B.R. at 914.

The bankruptcy court ruled that a supersedeas bond ceases to be estate property once the appellate process has concluded in favor of the bonded claimant. 128 B.R. at 482. The court recognized, however, that the bonded claimants' judgments and

their rights to execute on the bonds nevertheless could be avoidable on bankruptcy law grounds and that the punitive damage awards were subject to subordination and equitable limitation in bankruptcy:

> The Court's inquiry into whether the Section 105 stay should continue includes, *inter alia*, Debtor's ability to avoid any final judgment under the Bankruptcy Code, the necessity of protecting or disenfranchising Debtor's sureties, Debtor's ability to deal with the asbestos litigation within the reorganization plan and the effect on that process if the Section 105 stay were to be lifted, the treatment of the punitive damage portion of any judgment and the treatment of joint and several liability, contribution, and indemnification from co-defendants in other litigation.

Celotex, 140 B.R. at 914.

Again, on May 29, 1992, the bankruptcy court reaffirmed the Section 105 Injunction. 140 B.R. 912. The court made clear that the purpose of the injunction was to assure its ability to grant Celotex relief on its avoidance claims, if appropriate, while at the same time protecting the bonded claimants. *Id.* at 916. To expedite resolution of any such claims, the court ordered:

> ORDERED, ADJUDGED AND DECREED that Debtor shall file any preference action or any fraudulent transfer action or any other action to avoid or subordinate any judgment creditor's claim against any judgment creditor or against any surety on any

> supersedeas bond within 60 days of the entry of this Order.

Celotex Corp., 140 B.R. at 917.[3]

As to Celotex's compliance with this bankruptcy court order, Celotex advised the Fifth Circuit:

> As required by the second reported *Celotex* decision at 140 B.R. 912, the Edwards, all other bonded claimants and the sureties on such bonds are presently involved in an omnibus adversary proceeding in *The Celotex Corp. v. Allstate, et al.*, Adv. Pro. No. 92-584, United States Bankruptcy Court, Middle District of Florida, Tampa Division, to resolve whether any or a part of the collateral securing the bonds can be avoided as preferential payments or fraudulent transfers or equitably subordinated to the claims of all other unsecured asbestos victims' claims. Because the Edwards' judgment includes punitives and the timing of the posting of the bond is implicated in the adversary proceeding, the Edwards' entitlement to have the judgment satisfied in full is at issue pursuant to 11 U.S.C. §544 (fraudulent transfer) and 11 U.S.C. §510(c) (equitable subordination). Certainly Congress contemplated avoiding preferential

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[3] To protect the bonded claimants, the bankruptcy court ordered that: (a) the sureties involved, including Northbrook, establish interest-bearing accounts sufficient to assure full payment of the bonds; (b) Celotex create an interest-bearing reserve account or increase the face amount of any supersedeas bond to cover the full amount of judgment through confirmation; and (c) Celotex provide in any plan that the bonded claimants' claims be paid in full unless otherwise determined by the Court or agreed by the claimant. 140 B.R. at 917.

> transfers to sureties on supersedeas bonds as evidenced by 11 U.S.C. §547(d)....

See Celotex's Suggestion For Rehearing, in the United States Court of Appeals for the Fifth Circuit, at 7 n.5.

D. Proceedings Below (Within The Fifth Circuit)

1. The Motion in Texas for Release of the Bond

On May 3, 1991, Edwards filed a motion in the Texas district court under Fed. R. Civ. P. 65.1 seeking to release the supersedeas bond against Northbrook. Celotex and Northbrook (which had been served with the motion) opposed the motion, asserting that any proceeding to enforce the bond had been enjoined by the bankruptcy court. Northbrook also urged its interest in the orderly administration of justice:

> Northbrook's interest here is in the orderly administration of justice. The status of the bonds is *sub judice* in the bankruptcy court that is supervising the entire Celotex reorganization. Northbrook has a vital interest in not being subjected to conflicting court decisions concerning the supersedeas bonds. It also has an interest in the status of the bonds being decided economically, efficiently and expeditiously.

Northbrook Property and Casualty Insurance Company Memorandum In Opposition To Motion For Release of Supersedeas Bond, filed May 21, 1991 in the Northern District of Texas, at 6.

On February 3, 1992, at the request of the Texas district court, Celotex, Northbrook and Edwards filed a Joint Status Report. A-25. They advised the district court of the bankruptcy court's June 13, 1991 order and that the bankruptcy court had

held that judgment creditors of Celotex are enjoined from proceeding on any supersedeas bond without first vacating the October 17, 1990 Section 105 Injunction, which remained in effect. A-27.

Despite the Section 105 Injunction, on May 27, 1992 the district court granted Edwards' motion for release of the supersedeas bond. The court entered a brief order without written opinion or analysis. A-24.

2. The Fifth Circuit Decision

On November 5, 1993, the Fifth Circuit affirmed. It denied Celotex's petitions for rehearing and rehearing *en banc* on December 22, 1993.

The Fifth Circuit recognized that this is a case of conflict between coordinate federal courts (the Florida bankruptcy court and the Texas district court) as to the same matter. A-2; 6 F.3d at 314. The Fifth Circuit purported to resolve the conflict; "no usurpation is intended in this decision ...." *Id.* The court focused, however, on the jurisdiction of the bankruptcy court — and specifically whether the Section 105 Injunction fell within the bankruptcy court's exclusive jurisdiction under 28 U.S.C. § 1334(d) (exclusive jurisdiction over debtor's property and property of the estate) or the bankruptcy court's nonexclusive jurisdiction under 28 U.S.C. § 1334(b) (nonexclusive jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11"). A-5-6; 6 F.3d at 315.

Since the Florida bankruptcy court had already determined that bonds outstanding on concluded appeals, like the Edwards Bond, were not property of the estate, the answer was self-evident. A-10; 6 F.3d at 317. Bankruptcy court jurisdiction was not exclusive.

The Fifth Circuit, however, did *not* analyze collateral attack warfare between two coordinate federal courts when (as here) *both* courts have jurisdiction over the same matter. Instead, on rehearing, the court of appeals merely adverted to the existence of a court deadlock, with the following statement:

> Thus, we have not held that the bankruptcy court in Florida was necessarily wrong; we have only concluded that the district court, over which we do have appellate jurisdiction, was right.

A-20; 6 F.3d at 321.

The bulk of the Fifth Circuit opinion is devoted to the merits of the Florida bankruptcy court's exercise of Section 105 equity power.[4] "We must decide what limits must be placed on the [Florida] bankruptcy court's power to insure that both debtors and creditors remain adequately protected." A-2; 6 F.3d at 314.

The Fifth Circuit questioned whether the Section 105 Injunction even applied to the present case. In the court's view, the order "does not, on its face, reach to third parties." A-12; 6 F.3d at 318. The court recognized, however, "the bankruptcy court in this case has ruled that the stay, in its present state, would apply to enjoin the Edward's [sic] proceedings against Northbrook to execute the supersedeas bond." A-12-13; 6 F.3d at 318 (citing *Celotex*, 128 B.R. at 484).

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[4] The court of appeals rejected the argument that the automatic stay, under Section 362(a) of the Code, bars execution on the Edwards Bond. A-6-10; 6 F.2d at 316-17. The court reasoned that the automatic stay could not apply because the bond was not estate property and because execution on the bond was against Northbrook, a non-debtor. *Id.*

In light of the bankruptcy court's construction and reiteration of its own order, the Fifth Circuit set forth its own legal analysis of the injunction merits. The Fifth Circuit held that the Section 105 Injunction constituted an abuse of the bankruptcy court's equity power because the injunction defeated the purpose of the supersedeas bond. "The supersedeas bond was posted to cover precisely the type of eventuality which occurred in this case, insolvency of the judgment debtor." A-14; 6 F.3d at 319. The court expressly rejected the reasoning and result of the Fourth Circuit's decision in *Willis v. Celotex Corp.*, 978 F.2d 146 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1846 (1993). "[W]e disagree with the Fourth Circuit's proposed solution in *Willis*." A-13; 6 F.3d at 319. *Willis*, as the Fifth Circuit acknowledged, "decided that the bankruptcy court's power was sufficient to stay proceedings against third parties on supersedeas bonds." A-11; 6 F.3d at 318.

The Fifth Circuit acknowledged that "[s]ection 105 authorizes a bankruptcy court to enjoin litigants from pursuing actions pending in other courts that threaten the integrity of a bankrupt's estate." A-15; 6 F.3d at 320 (citation omitted). The appellate court concluded, however, that "the integrity of the estate is not implicated in the present case because the debtor has no present or future interest in this supersedeas bond." A-15-16; 6 F.3d at 320 (footnote omitted).

In reaching this conclusion, the Fifth Circuit did not consider potential rights of Celotex (which Celotex has asserted) to recover the bond proceeds. The Fifth Circuit did not advert to or analyze the possibility that execution on the bond could result in a bonded claimant's receipt of a preference or fraudulent transfer as beneficiary of a transfer of the bond collateral. *See* 11 U.S.C. § 550(a). Nor did it raise the issue of punitive damages. No mention or analysis was accorded the bankruptcy court's May 29, 1992 Order that Celotex file avoidance actions as to the bonded claimant's rights, as Celotex has done. (See *supra*, at 9-10.)

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I. THE FIFTH CIRCUIT'S DECISION TO PERMIT EXECUTION ON THE EDWARDS BOND IS IN CONFLICT WITH APPLICABLE PRECEDENT OF THIS COURT AND OF THE FIFTH CIRCUIT.

This Court has established that "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 386 (1980) (citations omitted); *accord United States v. United Mine Workers of America*, 330 U.S. 258, 293-94 (1947). As the Fifth Circuit itself teaches:

> Whether the grant of the injunction was erroneous is not the question here. Error must be corrected by appeal, and cannot be tested by disobedience. ... Willful disobedience of an injunction, however erroneous, issued by a court having jurisdiction while such injunction is in force unreversed constitutes contempt of court.

Locke v. United States, 75 F.2d 157, 159 (5th Cir.) (citations omitted) (affirming contempt order for defendant's violation of injunction, notwithstanding defendant's assertions as to its invalidity, where court issuing injunction had jurisdiction and defendant elected not to seek review of injunction by appeal), *cert. denied*, 295 U.S. 733 (1935).

The bankruptcy court here had jurisdiction to issue the Section 105 Injunction. As shown by the bankruptcy court's June 1991 and May 1992 published opinions, the purpose of the Section 105 Injunction is to assure the Court's ability to grant just and effective relief as to avoidance and subordination

claims pertaining to the bonds, the bond collateral and punitive damage awards, as well as to protect Celotex's ability to reorganize. *See* 140 B.R. at 915-17; 128 B.R. at 482-84. Whether or not the bankruptcy court abused its discretion in issuing and maintaining the Section 105 Injunction, its jurisdiction (*i.e.*, its actual power) to issue the injunction is unquestionable.

The bankruptcy courts, as adjuncts of the federal district courts, have broad jurisdiction encompassing all civil proceedings "arising under title 11, or arising in or related to cases under title 11 [Bankruptcy Code]." *See* 28 U.S.C. §1334(b).[5] There is abundant authority holding that suits to enjoin non-debtors from taking actions that interfere with a debtor's ability to maximize the value of its estate and reorganize are core bankruptcy proceedings. *See, e.g., In re Johns-Manville Corp.*, 801 F.2d 60, 64 (2d Cir. 1986) (action to enjoin debtor's stockholders from prosecuting state court action to compel debtor to hold shareholders' meeting).[6] Moreover, temporary

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[5] *See also* 28 U.S.C. § 157(b)(2), which provides a non-exclusive listing of core bankruptcy proceedings. As a general matter, a case "arising under title 11," *i.e.*, created or determined by a statutory provision of title 11, is a core bankruptcy proceeding. *In re Wood*, 825 F.2d 90, 96 (5th Cir. 1987). A case "arising in" a bankruptcy proceeding, *i.e.*, an administrative matter that arises only in a bankruptcy case, is also a core matter. *Id.* at 97.

[6] *See also In re Stadium Management Corp.*, 95 B.R. 264, 267 (D. Mass. 1988) (action to enjoin bank from foreclosing on property owned by debtor's subsidiary); *In re Deltacorp., Inc.*, 111 B.R. 419, 420 (Bankr. S.D.N.Y. 1990) (action to enjoin government from appointing receiver for S & L owned by a holding company of which the debtor is the 53% parent); *In re Monroe Well Serv., Inc.*, 67 B.R. 746, 753-54 (Bankr. E.D. Pa. 1986) (action to compel initial purchasers of oil from debtor (i) to comply with "division orders" which established how proceeds of oil were to be divided up and (ii) not to pay sums to lien creditors of debtor who had valid lien against oil and its proceeds; according to court, this proceeding involved "non-estate funds held by third-parties").

and permanent Section 105 injunctions barring suit against non-debtors, issued as core matters and often as part of a Plan, are an accepted aspect of large corporate reorganization.[7]

Given the bankruptcy court's jurisdiction to enter and keep in place the Section 105 Injunction, the only method for review of the validity of the injunction is by appeal to the United States District Court for the Middle District of Florida and then the Eleventh Circuit. *See Locke*, 75 F.2d at 159. As this Court explained in *Howat v. State of Kansas*, 258 U.S. 181, 189-90 (1922) (emphasis added; citations omitted):

> An injunction duly issuing out of a court of general jurisdiction with equity powers, upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them, however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming, but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, *and until its decision is reversed for error by orderly review,*

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[7] *See, e.g., In re A.H. Robins Co.*, 880 F.2d 694, 702 (4th Cir.) (affirming power of bankruptcy court to enjoin suits against non-debtors, where there existed certain indemnification rights against the debtor), *cert. denied*, 493 U.S. 959 (1989); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir.) (permanent injunction may be issued against actions against an insurer as part of settlement incorporated in a Chapter 11 plan), *cert. denied*, 488 U.S. 868 (1988); *Willis v. Celotex Corp.*, 978 F.2d 146 (4th Cir. 1992) (upholding validity of bankruptcy court's Section 105 stay of execution against surety on supersedeas bonds), *cert. denied*, 113 S.Ct. 1946 (1993); *In re Myerson & Kuhn*, 121 B.R. 145, 153-54 (Bankr. S.D.N.Y. 1990) (Section 105 grants power to enjoin actions against debtor's partners, where such actions would significantly interfere with debtor's ability to formulate a plan); *In re Otero Mills, Inc.*, 21 B.R. 777 (Bankr. D. N. Mex.) (granting §105 injunction to prevent creditor from proceeding on judgment against debtor's president), *aff'd*, 25 B.R. 1018 (D.N. Mex. 1982).

> *either by itself or by a higher court, its orders based on its decision are to be respected,* and disobedience of them is contempt of its lawful authority, to be punished.

Accord Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 439-40 (1976) ("[T]hose who are subject to the commands of an injunctive order must obey those commands, notwithstanding eminently reasonably and proper objections to the order, until it is modified or reversed.").

The Fifth Circuit's decision, permitting Edwards to ignore the bankruptcy court's injunction, conflicts with clear precedent of this Court and of the Fifth Circuit itself.

II. THE FIFTH CIRCUIT'S COLLATERAL ATTACK ON, AND INTERFERENCE WITH, THE BANKRUPTCY COURT'S INJUNCTION VIOLATES ESTABLISHED PRINCIPLES OF COMITY AND FEDERAL JURISDICTION AND CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Both Northbrook and Edwards are subject to conflicting court orders. If the Edwards take further steps to execute on the bond, they face contempt sanctions in the Florida bankruptcy court. If Northbrook refuses to pay on the bond, it faces enforcement process in the Northern District of Texas. No litigant in the federal system should be confronted with such choices. Exercise of this Court's supervisory power is necessary to break the deadlock.

The decision of the Fifth Circuit constitutes a radical departure from the accepted and usual course of judicial proceedings. Comity and orderly administration of justice dictate that coordinate federal courts not hear the same matter simultaneously. *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952). Actions to vacate an injunction should

be brought to the rendering court or by appeal from the rendering court, not by original action in a coordinate federal court. *See Lapin v. Shulton, Inc.*, 333 F.2d 169 (9th Cir.), *cert. denied*, 379 U.S. 404 (1964). "[C]onsiderations of comity and orderly administration of justice demand that the non-rendering court should decline jurisdiction of such an action and remand the parties for their relief to the rendering court, so long as it is apparent that a remedy is available there." *Id.* at 172.[8]

The instant collateral attack on the Florida bankruptcy court is unseemly. Already collateral attack has resulted in two directly opposite federal appellate decisions (*Willis* and *Edwards*) as to the correctness of the Section 105 Injunction — neither from the Eleventh Circuit, the only federal circuit with appellate jurisdiction over the bankruptcy court. Under 28 U.S.C. § 158(a), an appeal from the bankruptcy court "shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving." Accordingly, the United States District Court for the Middle District of Florida has *exclusive* appellate jurisdiction here. Further appeal is to the United States Court of Appeals for the Eleventh Circuit. *See* 28 U.S.C. § 158(a).

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[8] Numerous federal decisions respect this principle. *See, e.g., Carter v. United States*, 733 F.2d 735, 736 (10th Cir. 1984) (one district court is without jurisdiction to grant relief from an injunction entered by a district court sitting in another circuit), *cert. denied*, 469 U.S. 1161 (1985); *accord Carter v. Attorney General of the United States*, 782 F.2d 138, 142 (10th Cir. 1986) (same); *Treadaway v. Academy of Motion Picture Arts and Sciences*, 783 F.2d 1418, 1421-22 (9th Cir. 1986) (considerations of comity provide ample justification for district court's dismissal of action to set aside bankruptcy court order confirming sale); *Feller v. Brock*, 802 F.2d 722, 727-28 (4th Cir. 1986) ("Prudence requires that whenever possible, coordinate courts should avoid issuing conflicting orders."); *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403, 407-08 (5th Cir. 1971) (for reasons of comity and sound judicial administration, one federal district court must not issue injunction that interferes with ability of another federal district court to supervise its own injunction).

A system that permits appeal from one federal trial judge to another in a different circuit — as has happened here — ultimately impugns the entire appellate system. It encourages forum shopping and evasion of the rules and statutes governing federal appeals.

The Florida bankruptcy court is performing its judicial duties in accordance with applicable statutes and rules. Unless and until that court's injunctive orders are reversed on appeal, they should be obeyed. *See Howat v. State of Kansas*, 258 U.S. 181, 190 (1922) (until the injunction-rendering court's "decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected"); *Ellicott Mach. Corp. v. Modern Welding Co., Inc.*, 502 F.2d 178 (4th Cir. 1974) (review of district court order is by appeal to the appropriate circuit court, not by collateral attack to another federal trial judge).

CONCLUSION

For the foregoing reasons this petition for leave to intervene and petition for writ of certiorari should be granted. In the alternative, the petition for writ of certiorari filed by The Celotex Corporation should be granted.

Respectfully submitted,

ROBERT B. MILLNER
(Counsel of Record)
LORIE A. CHAITEN
Sonnenschein Nath & Rosenthal
8000 Sears Tower
Chicago, IL 60606-6404

Counsel for Petitioner
Northbrook Property and
Casualty Insurance Company

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